FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Reform of Access Charges Imposed by Competitive Local Exchange Carriers	)	

OPPOSITION OF SPRINT TO PETITIONS FOR RECONSIDERATION

Sprint Corporation ("Sprint"), on behalf of its operating subsidiaries, hereby opposes six of the seven petitions for reconsideration or Clarification of the Commission's *Seventh Report and Order* in the above-captioned rulemaking (FCC 01-146) released April 27, 2001. Specifically, Sprint opposes the petitions filed by Focal and US LEC jointly, the Minnesota CLEC Consortium ("MCC"), the Rural Independent Competitive Alliance ("RICA"), TDS MetroCom, Time Warner Telecom ("TWTC"), and U.S. TelePacific ("TelePacific"). As will be discussed below, these petitions are generally without merit and should be denied.[1]

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[1] However, Sprint does not oppose the petition for clarification filed by Qwest Communications International. Qwest seeks clarification that (1) a competitive local carrier (CLEC) may tariff its access service charges at the total switched access rate of the competing ILEC only with respect to the functions that the CLEC is performing itself, and when an ILEC performs such a function instead (e.g., tandem switching), the ILEC charges should not be reflected in the CLEC's benchmark rate; and (2) any statutory duty of an IXC to provide service to end users of a CLEC should be conditioned on the CLEC providing timely and sufficient information to the IXC to allow the IXC to bill the CLEC's end users for interexchange services provided to them. Sprint believes the merits of both of Qwest's requests are self-evident, and Sprint reserves the right to file a reply in support of Qwest's petition should any oppositions be filed.

U.S. TelePacific

TelePacific seeks clarification of how to set ILEC-based benchmarks in market areas served by more than one ILEC. It argues (at 5) that its billing system is not capable of tracking customers according to the ILEC serving each customer's locale and argues that some averaging method should be employed instead. To this end, TelePacific proposes and discusses (at 7-10) three types of averaging: (1) a simple numerical average of the rates of the ILECs serving the service area or new market MSA; (2) an average weighted by the number of the individual CLEC's end users in each of the ILEC territories in the market; and (3) an average weighted by each relevant ILEC's total access traffic volume in the state.

TelePacific has not demonstrated that basing the benchmark on the rates of each competing ILEC creates problems of sufficient magnitude to warrant a change in the Commission's Order. TelePacific provides no detail on how much time or work would be necessary to develop the software changes needed to enable it to comply with the Order, nor is there any indication that the alleged limitations of TelePacific's existing billing system are common among other CLECs. On the contrary, both MCC and RICA, which represent small, rural CLECs, favor rule changes that would allow them to impose separate rates for their rural and urban end user customers, which suggests that their members do have the capability of billing in a differential fashion. Although any carrier that can demonstrate genuine hardship can seek a waiver of a Commission rule, TelePacific has failed to show that it would merit such a waiver, much less that a change in the general rule is necessary.

Moreover, TelePacific itself concedes that each of the averaging methods it discusses is problematic. The simple numeric average would give undue weight to the access charges of smaller ILECs who serve minor parts of a local calling area (TelePacific at 7). Weighting the average by the number of lines the CLEC has in each ILEC's service territory would require the use of confidential CLEC information that would have to be audited to ensure accuracy and would also have to be updated periodically to reflect the changes in weightings (*id*. at 8). The third method – weighting the average by the statewide minutes of use generated by each ILEC in a local calling area – would, as TelePacific admits, "not be directly proportionate to CLEC access traffic sent to end users in the ILEC's territories . . . " (*id*. at 9). Moreover, the relative statewide traffic volumes of the ILECs may not at all mirror their relative access volumes in the local calling area in question (data which, TelePacific admits (*id*.), are not available).

Given the pitfalls of each of these proposed averaging methods, Sprint urges the Commission to leave the Order unchanged. If any CLEC does indeed have problems billing properly under these rules, it should be required (since the ILEC benchmark is only a ceiling) to bill access to and from all of its end users on the basis of the lowest ILEC rate in the local calling area or new market MSA. Such a result would provide the proper business incentive for the CLEC to undertake the necessary modifications of its billing system: each ILEC could decide for itself whether the cost of modifying its billing system is or is not offset by the added access revenues it could obtain by modifying that system.

Focal/US LEC and TWTC

Focal/US LEC and TWTC seek reconsideration of the Commission's determination that the benchmark rate for a CLEC entering a new market is the ILEC level, in contrast to the three-year transition to ILEC levels permitted in markets where the CLEC is now operating.[2] Much of their attack on the new market rule is specious and wholly without merit. The Focal/US LEC contention (at 2-6) that the Commission failed to give adequate notice that it was considering an

[2] See, also, TDS Metrocom at 18-19. Other issues raised by TDS are addressed separately below.

immediate ILEC benchmark in new markets is simply wrong. In the *Fifth Report and Order and Further Notice of Proposed Rulemaking* ("*FNPRM*") in this proceeding (14 FCC Rcd 14221 (1999)), the Commission asked for comment on a wide range of methods for regulating CLEC access rates, including (at ¶247) using the ILEC rate as a benchmark, and using some other benchmark instead (¶¶247-248). This open-ended invitation to consider both ILEC-based and other benchmarks clearly sufficed to "adequately frame the subjects for discussion"[3] and to place the result reached within the scope of a "logical outgrowth" of the *FNPRM*.[4]

The petitioners' arguments that they have made substantial investments in preparing to enter markets that they had not entered before the Commission's Order became effective, that these investments were predicated on the previously existing regulatory environment and that it is unfair to deny them an opportunity to charge above-ILEC rates for a transitional period in these new markets likewise have no substance. Here, the previous regulatory environment gave these CLECs no realistic expectation that they could successfully charge above-ILEC rates in any market, new or existing. The *First Report and Order* in this proceeding (12 FCC Rcd 15982 (1997)) put the CLEC industry on clear notice that the Commission would view with concern any attempts to charge above-ILEC rates for access and stood ready to take corrective action through the complaint process. Thus, the Commission stated (*id*. at 16142, ¶364):

> Similarly, terminating rates that exceed those charged by the incumbent LEC serving the same market may suggest that competitive LEC's terminating access rates are excessive.

See also *id*. at 16141, ¶363 (footnote omitted):

> Thus, if an access provider's service offerings violate Section 201 or Section 202 of the Act, we can address any issue of unlawful rates through the exercise of our authority to investigate and

[3] *Connecticut Light and Power Co. v. Nuclear Regulatory Commission*, 673 F.2d 525, 533 (D.C. Cir.), *cert. denied*, 459 U. S. 835 (1982).

[4] *Omnipoint Corp. v. FCC*, 78 F.3d 620, 631-32 (D.C. Cir. 1996).

> adjudicate complaints under Section 208 . . . . We emphasize that we will not hesitate to use our authority under Section 208 to take corrective action where appropriate.

In short, these ILECs had no assurance that they could retain above-ILEC access charges in existing markets. Moreover, the 1999 *FNPRM* foreshadowed more direct regulation of CLEC access charges well in advance of the alleged 16-20 month planning and investment horizon for new market entry (TWTC at 7).

The disparity in benchmark rates for new market entrants and CLECs already serving a market can be a legitimate cause for concern. However, petitioners have not shown that they will suffer material prejudice from this differential, and they ask for the wrong cure. Unlike the growth/new market restrictions in the *ISP Compensation Order,*[5] which Sprint is appealing,[6] the rule adopted in this order allows the new entrant to charge for access at the same level as its primary and dominant competitor: the ILEC. Thus, the new market rule here does not subject the new-entrant CLEC to <u>any</u> competitive disadvantage *vis-à-vis* the ILEC. Although pre-existing CLECs may have an advantage over the new entrant from being able to charge higher access charges, the petitioners have failed to show that they must price against other CLECs rather than the ILEC.[7] Moreover, the disparate treatment between new and existing CLECs in this order will end in three years, whereas the disparate treatment in the *ISP Compensation Order* will last into the indefinite future, absent further Commission action.

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5 *Intercarrier Compensation for ISP-Bound Traffic*, *et al*., FCC 01-131, released April 27, 2001.

6 *Sprint Corp. v. FCC*, CADC No. 01-1229, consolidated with *WorldCom Inc. v. FCC*, CADC No. 01-1218.

7 The fact that many CLECs today are charging ILEC-level rates (Order ¶49) while others are charging as much as 9.5 cents per minute (¶48), is a strong indication that CLECs are not placed at a competitive disadvantage by charging less for access than other CLECs. Were that the case, one would expect that all CLECs would have raised their access charges to the 9.5 cent level.

In any event, the way to eliminate the disparity in safe harbor benchmark rates for existing carriers and new entrants is not to raise the new market benchmark or delay its effectiveness for some period of time, as Focal/US LEC and TWTC argue. Rather, given the Commission's findings that CLECs possess bottleneck power over access (¶30) and that the CLECs have been exploiting their market power (¶34), coupled with the Commission's warnings four years ago against CLEC access charges that exceed ILEC levels, the only economically rational way to eliminate the disparity between the benchmarks for existing CLECs and new market entrants is by imposing the ILEC-level benchmark on <u>all</u> CLECs.

<u>MCC and RICA</u>

MCC and RICA both ask for extensive changes in the safe harbor rates for rural CLECs: increasing the benchmark rate to include the NECA common carrier line charges, changing the definition of rural CLEC in the eligibility criteria to include CLECs that serve both rural and non-rural customers, and making the rural safe harbor rate applicable not only if the competing ILEC is a non-rural price cap LEC, but also if the ILEC is a rural telephone company as defined by §153(37) of the Act.

Sprint continues to believe that there is no sound economic rationale for a separate rural benchmark. As the Commission observed (¶59), in a competitive market "new entrants can successfully enter only at or below the prevailing market price." This is just as true when a CLEC enters a rural market as it is in the urban context. Thus, given the reality that large ILECs often serve both urban and rural areas, the "competitive market" result the Commission seeks to emulate (*id.*) would warrant no differential for rural CLECs. Moreover, although the Commission accepted the rural CLECs' claim that they face higher costs (¶66), the record cited by the Commission for this proposition (*see* n. 139) contains no cost data whatsoever.

Notwithstanding these objections, Sprint has previously stated that it would acquiesce in a separate rural benchmark as long as the benchmark rate was sufficiently low and the criteria for charging the benchmark were sufficiently limited. In that regard, although Sprint has appealed the order,[8] Sprint does not at this time plan to challenge the rural benchmark. However, the increase in the benchmark and the substantial expansion of its applicability, proposed by MCC and RICA, are more than Sprint could acquiesce in.

The determination not to allow the NECA CCL charge as part of the rural benchmark (Order, ¶81) is entirely sound. The competing ILECs do not charge a CCL, and the Commission pointed out that the CLECs are free to mirror the ILECs' subscriber line charge in their end user rates. RICA's contention (at 4) that rural CLECs have higher costs than the competing large ILECs in part because the rural CLECs offer higher quality and more advanced service contradicts its claim (at 6) that rural CLECs should not be expected to impose their allegedly higher costs on end users. If end users perceive the CLECs' services to be superior, they should be willing to pay for those superior services; if they are not willing to pay more, then the CLECs have no right to force captive IXCs to absorb those costs. Rather, the rural CLECs will have embarked on a bad business plan for which they, alone, should be held responsible.

Likewise, the Commission should adhere to its determination that the rural benchmark rate is only available in cases where the rural CLEC is competing with a non-rural ILEC. The Commission's entire predicate for the rural exemption is the belief that it is unfair to hold a rural CLEC's access charges to the level of an ILEC that competes in both urban and rural areas and

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[8] *Sprint Corp. v. FCC*, CADC No. 01-1263.

whose averaged access charges thus reflect the economies of the ILEC's urban operations. Thus, the exception was intended to apply "only when the competing ILEC has broad-based operations that include concentrated, urban areas that allow it to subsidize its rural operations and therefore charge an artificially low rate for access to its rural customers" (¶79). To extend the eligibility for the rural exemption to CLECs that compete with rural price cap carriers that do not serve "concentrated urban areas" is wholly unwarranted. The fact that rural price cap ILECs may be larger than rural CLECs and may "experience economies of scale not available to the Rural CLECs" (RICA at 8) is irrelevant. If the rural CLEC cannot successfully compete with a rural price cap ILEC by charging prices at or below those of the ILEC or by persuading end users to pay more than ILEC rates for the CLEC's allegedly superior service, then the rural CLEC simply has an unsound business plan, and its entry, at the expense of IXCs and their customers, would harm consumer welfare.

These parties' requests that rural CLECs should be eligible for the higher benchmark for all of their rural customers, even if they choose to serve urban areas as well, likewise vitiates the Commission's predicate for the higher rural benchmark. Each CLEC has a choice: to enter both urban and rural markets and have its access charges held to the generally applicable benchmarks, or to confine its operations to rural areas served by non-rural ILECs and to take advantage of the higher benchmark afforded under the Commission's plan. There is no reason to let a CLEC have the best of both worlds: competing in urban areas against an ILEC whose urban retail rates and access charges are affected by its rural operations, while being allowed to charge above-ILEC access charges in the rural portions of the ILEC's territory.

In addition to the issues discussed above, RICA seeks clarification of two aspects of the Commission's order which Sprint will address in turn. First, RICA asks (at 13-15) whether the

Commission's contemplation that CLECs may have negotiated agreements with IXCs that differ from the rates in their tariffs means that the CLEC would not be liable for unjust discrimination as between customers subject to its tariffed rates and its contract rates. Clearly, the Commission's order and safe harbor benchmarks only relate to the reasonableness of the rates and do not address any possible discrimination issues that might arise. See *e.g.*, ¶40 (benchmark rates "will be conclusively presumed to be just and reasonable") and ¶41 ("a benchmark provides a bright line rule that permits a simple determination of whether a CLEC's access rates are just and reasonable"). Whether charging a higher tariffed rate while agreeing to a lower rate in a contract is unlawfully discriminatory is necessarily an issue for case-by-case determination, one in which the CLEC must ultimately bear the burden of justifying the charging of higher rates to some customers than to others for like services. Without any concrete factual record in which to address the issue, the Commission has no choice but to leave the discrimination issue to case-by-case adjudication.

Second, RICA asks clarification (at 15-16) of whether a CLEC may impose multi-line PICC charges on top of the benchmark rates and whether PICC charges can be tariffed when the competing ILEC does not have a PICC charge. Sprint believes that both the Order and implementing rule (§61.26)(a)(5)) are clear: the Commission is not constraining the CLEC to have the same rate structure as the ILEC – *i.e*, the same mix of flat-rates, usage-sensitive, or distance-sensitive charges that the ILEC employs (see ¶54) – but the combination of flat-rated charges (such as a PICC) and usage-based charges cannot exceed the overall benchmark charge calculated on a per-minute basis. See *id*. ("we intend to permit CLECs to receive revenues equivalent to those the ILECs receive *from IXCs*, whether they are expressed as per-minute or flat-rate charges"); *see, also* ¶55 (the benchmark "does not dictate whether a CLEC must use flat-rate charges or per-minute charges, so long as the composite rate does not exceed the benchmark"). The Order is perfectly consistent with §61.26(a)(5), which states that the "rate" for interstate switched access services "shall mean the composite, per-minute rate for these services, including all applicable fixed and traffic-sensitive charges." In short, CLECs may impose PICCs in circumstances where the competing ILEC does not, but the revenues from those PICCs are included along with usage charges in determining whether the overall rate exceeds the applicable benchmark.

TDS MetroCom

TDS MetroCom proposes two additional benchmark rates for CLECs competing in small and medium-sized urban areas. It bases its request solely on the alleged higher costs of serving such markets as compared with large urban markets. Not only has TDS MetroCom failed to demonstrate that such costs are indeed greater to any appreciable degree, but at bottom, the CLEC's costs are irrelevant. As the Commission observed in ¶59, in a competitive market "new entrants can successfully enter only at or below at the prevailing market price," and no carrier whose costs exceed those of its competitor has any reasonable expectation of being able to recover such higher costs. Competition is ordinarily expected to result in lower prices for consumers, not higher prices, and any attempt to broaden the misconceived rural exemption to include other geographic areas will result in additional uneconomic entry. TDS's request for higher small/medium urban benchmarks should be denied.

Likewise, there is no need for the Commission to impose a mandatory dispute resolution process, such as arbitration, on IXCs in instances where a CLEC wishes to attempt to persuade an IXC to agree to higher-than-benchmark access charges (see Petition at 17). If an IXC does not perceive higher value from a CLEC's service than the benchmark rate, there is no legitimate dispute to resolve, since above-benchmark rates, in the absence of an IXC's agreement to pay them, are simply impermissible. See ¶97 ("a CLEC must charge the benchmark rate . . . if the parties cannot agree to a rate in excess of the benchmark"). The CLEC is perfectly free to charge its end user customers whatever it wishes for the services they receive, and since they are the persons in a position to make the carrier selection, they will appropriately discipline the market. See Order at ¶39.

CONCLUSION

Sprint urges the Commission to dispose of the petitions for reconsideration or clarification in accordance with its views expressed above.

Respectfully submitted,

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July 23, 2001